Decision **PROPOSED DECISION OF ALJ YACKNIN** **(Mailed 10/11/2013)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902-E) for Approval of a Settlement Agreement and Related Amendments to its Power Purchase Agreements with Otay Mesa Energy Center, LLC and Calpine Energy Services, L.P.	Application 13-05-012 (Filed May 17, 2013)

(See Appendix A for Appearances)

DECISION APPROVING SETTLEMENT AGREEMENT AND RELATED AMENDMENTS TO SAN DIEGO GAS & ELECTRIC COMPANY'S POWER PURCHASE AGREEMENTS WITH OTAY MESA ENERGY CENTER, LLC AND CALPINE ENERGY SERVICES, L.P.

1. Summary

This decision approves the settlement agreement and amendments to San Diego Gas & Electric Company's power purchase agreements with Otay Mesa Energy Center, LLC and Calpine Energy Services, L.P., and authorizes San Diego Gas & Electric Company to recover its costs pursuant to the amendments in the Energy Resource Recovery Account. This proceeding is closed.

2. Background

By this application, San Diego Gas & Electric Company (SDG&E) seeks approval of a settlement agreement and related amendments to its power

purchase agreements with Otay Mesa Energy Center, LLC (OMEC)[1] and Calpine Energy Services, L.P. (CES)[2] to resolve an ongoing dispute concerning force majeure claims related to the OMEC power purchase agreement (PPA).

The settlement agreement results from a dispute between SDG&E and OMEC regarding two extended outages at the OMEC facility due to a failure of the generator. On September 4, 2010, the generator at the OMEC facility tripped offline. OMEC subsequently provided notice to SDG&E that it believed the outage constituted a force majeure event as defined in the OMEC power purchase agreement[3] and requested its full capacity payment for the facility even

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[1] OMEC is a wholly-owned subsidiary of the Calpine Corporation.

[2] CES is an affiliate of the Calpine Corporation.

[3] The existing OMEC PPA states that mechanical or equipment breakdowns or failures may not constitute force majeure if "the design, construction, operation or maintenance of such machinery or equipment [was done] in a manner that is inconsistent with Good Utility Practice." The power purchase agreement defines "Good Utility Practice" as "any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility power industry during the relevant time period, or any of the practices, methods, and acts which, in the exercise of reasonable judgment in the light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good Utility Practice does not require use of the optimum practice, method, or act, but only requires use of practices, methods, or acts generally accepted in the region covered by the WECC [Western Electricity Coordinating Council]. With respect to the [OMEC] Facility, Good Utility Practice includes, but is not limited to, taking reasonable steps to ensure that: (a) equipment, materials, resources, and supplies, including spare parts, inventories, are available to meet the Facility's needs; (b) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the facilities and systems properly, efficiently, and in coordination with Buyer and its facilities and systems and are capable of responding to reasonably foreseeable emergency conditions; (c) preventive, routine, and non-routine maintenance and repairs are performed on a basis that complies with all manufacturer recommendations and

Footnote continued on next page

though the portion of the OMEC facility related to the generator output was unavailable. As allowed by the OMEC PPA, SDG&E made the requested full capacity payments under a reservation of its right to contest the force majeure claim.

On April 10, 2011, the generator again tripped offline, and OMEC again provided notice to SDG&E that it believed the outage constituted a force majeure event and requested its full capacity payment for the facility. SDG&E declined to make capacity payments related to the April 2011 outage until OMEC provided further support for its force majeure claims for both the September 2010 and April 2011 outages.

Separate and distinct from the OMEC outages, as part of its efforts to optimize its Renewable Portfolio Standard (RPS) portfolio, SDG&E desired to reduce deliveries pursuant to, or terminate, the PPA with CES for the Geysers geothermal facility. CES consented to a reduction in volume for the Geysers PPA so long as SDG&E and OMEC also settled the force majeure claims related to the September 2010 and April 2011 OMEC outages.

The settlement agreement has three components: First, the settlement agreement would resolve the force majeure claims by having SDG&E withdraw

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ensures reliable long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools; (d) appropriate monitoring and testing are performed to ensure equipment is functioning as designed; (e) equipment is not operated (i) in a reckless manner, (ii) in a manner unsafe to workers, the general public, or Seller, Buyer or their facilities and systems, or (iii) contrary to manufacturer's specifications and applicable Law or without regard to defined limitations; and (f) the equipment will function properly under both normal and foreseeable emergency conditions at the Facility and/or on the SDG&E Grid.

its reservation of rights with respect to the September 2010 outage and pay the withheld capacity payment with interest with respect to the April 2011 outage.

Second, the settlement agreement would modify the definition of "force majeure" in the OMEC PPA to exclude mechanical breakdowns or failures, unless the breakdown or failure is caused by something that, in and of itself, qualifies as a force majeure event as defined in the power purchase agreement; to balance the resulting increased risk to OMEC, the settlement agreement would modify the facility's default availability requirement in the OMEC PPA.

Third, the settlement agreement would amend the Geysers PPA to reduce the total capacity delivered to SDG&E in 2014 from 25 megawatts (MW) to 13 MW, and to reduce CES's obligation to provide resource adequacy and load uplift. The net effect of the amendments to the Geysers PPA would be to credit SDG&E for the 12 MW of capacity that would not be delivered, and require SDG&E to purchase replacement resource adequacy and energy to replace the RPS energy that will be lost in the reduction in capacity deliveries.

SDG&E filed this application on May 17, 2013. Notice of the application appeared in the Daily Calendar on June 4, 2013. After the prehearing conference on August 15, 2013, the assigned Commissioner issued a scoping memo and ruling on August 19, 2013, identifying the issues to be determined by the Commission in resolving the application and setting a schedule for addressing those issues. An evidentiary hearing was held on September 4, 2013. Utility Consumers' Action Network (UCAN) filed its opening brief on

September 16, 2013, and SDG&E filed its responsive brief on September 23, 2013, upon which the record was submitted.[4]

3. Discussion

As identified in the scoping memo, the issue in this proceeding is whether the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

3.1. Reasonableness of Settlement

SDG&E contends, and its witness Roberts testifies, that the ratepayer cost of the settlement will be about 50 cents on the dollar for those dollars in dispute. SDG&E and Roberts calculate this by comparing the net cost of paying OMEC the full amount of the force majeure claims, relieving SDG&E of the obligation to purchase 12 MW under the Geysers PPA, and purchasing the replacement resource adequacy and RPS energy, on the one hand, to the amount of the force majeure claims on the other hand. However, this comparison does not accurately reflect the relative costs of settlement versus no settlement.

Absent the settlement, SDG&E would be at risk for up to the full amount of the force majeure claims. However, SDG&E would also be able to re-sell the 12 MW that are the subject of the proposed Geysers PPA amendment, albeit at a loss. Furthermore, SDG&E will be obligated to purchase the replacement resource adequacy and RPS energy regardless of whether it is relieved of the obligation to purchase 12 MW under the settlement or re-sells the 12 MW absent the settlement. Thus, the settlement provides a benefit in the amount of the

[4] By informal rulings on September 18 and September 26, 2013, which we hereby affirm, the ALJ granted the motions of UCAN and SDG&E to file the confidential versions of their respective briefs under seal.

avoided loss that SDG&E would otherwise incur by re-selling the 12 MW, at the cost of the full amount of the force majeure claims. Comparing the net ratepayer cost of the settlement (payment of the full amount in dispute less the avoided loss) to the amount of dispute, the ratepayer cost of the settlement is about 70 cents on the dollar, not 50 cents.

UCAN recommends that the Commission reject the settlement in favor of its proposed alternative under which ratepayers would pay only 50 percent of the amount of the force majeure claims and the parties did not amend the Geysers PPA.[5] There is no question that ratepayers would be better off with a settlement that cost them, in net costs, only 50 cents on the dollar as opposed to 70 cents. However, this truism does not inform the matter, either with regard to whether the settlement amount reasonably reflects the litigation risk or whether CES would be amenable to the UCAN's proposed resolution of the dispute, and UCAN does not point to any evidence that would inform it.[6]

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[5] SDG&E errs in its comparison of the relative ratepayer costs under UCAN's proposal versus the settlement. SDG&E shows the payment for the 12 MW associated with the Geysers PPA amendment as a cost under the UCAN proposal but not under the settlement, and shows that same amount as a credit for not purchasing that volume under the settlement. (SDG&E opening brief, Table 1, at 7.) The failure to include (or exclude) the payment for the 12 MW in both calculations results in double-counting the credit for not purchasing the 12 MW in the calculation of ratepayer costs of the settlement.

[6] SDG&E objects that UCAN's introduction of an alternative settlement proposal improperly introduces new evidence outside of the evidentiary record. To the contrary, UCAN's alternative settlement proposal does not introduce new evidence beyond the irrefutable fact that ratepayers are better off paying less than paying more to settlement a dispute. The numbers in UCAN's and SDG&E's respective comparisons of the cost of the settlement and UCAN's alternative settlement proposal are not in dispute; only the validity of the respective calculations are in dispute, and that is properly argued in closing briefs.

Be that as it may, the force majeure language in the OMEC PPA creates significant litigation risk. The definition of "force majeure" excludes equipment breakdowns or failures that are inconsistent with "Good Utility Practice." The OMEC PPA defines "Good Utility Practice" by reference to what constitutes "reasonable judgment" in taking "reasonable steps" at a "reasonable cost" consistent with "good business practices, reliability, safety, and expedition." This definition lacks any meaningful, objective standards as to what constitutes "reasonable" operation and practice short of overt recklessness or intention to do harm.

Although it agrees that the force majeure language is "problematic," UCAN argues that the settlement should be rejected because SDG&E did not exercise due diligence to confirm whether OMEC was using "Good Utility Practice" as defined in the OMEC PPA. To the contrary, SDG&E and OMEC determined that fragments of the lamination used to shield the steam turbine generator coils detached and created ground faults, which caused the outages. SDG&E and OMEC spent several months investigating, testing and exchanging information, although they were not able to identify the root cause for the detachment. In any event, even if further effort might lead to the identification of the root cause, the ambiguity of the force majeure language suggests that the only way to confirm whether the root cause resulted from OMEC's deviation from "Good Utility Practice" would be to obtain a court order on the issue. Under these circumstances, SDG&E exercised due diligence before entering into the settlement.

In light of the whole record, the settlement is reasonable.

3.2. Consistency with Law

Nothing in the settlement agreement contravenes any statute or Commission decision or rule. In particular, reducing deliveries from the Geysers facility is consistent with SDG&E's RPS Plan.

The record, consistent with the recent forecast by the Commission's Energy Division,[7] indicates that SDG&E has excess RPS procurement in the Compliance Period 2014-2016. SDG&E's 2012 RPS Plan, which the Commission approved in Decision 12-11-016, provides that SDG&E will seek to optimize its RPS portfolio to maximize ratepayer value through, among other things, banking, sales and short-term purchases. Pursuant to its 2012 RPS Plan, SDG&E has recently entered into PPAs to sell renewable energy or gain an option to terminate existing PPAs, and has received Commission approval to do so. (See, e.g., Resolution E-4608 and Resolution E-4587.) Reducing deliveries pursuant to the Geysers PPA and purchasing the replacement resource adequacy and RPS energy at prices that are forecast to be significantly less than the terms of the current Geysers PPA are consistent with these efforts and will not jeopardize SDG&E's RPS compliance.

3.3. Public Interest

The settlement agreement avoids the time, expense and uncertainty of further litigating and resolving the current force majeure disputes. In addition, by clarifying the definition of "force majeure" in the OMEC PPA, the settlement agreement reduces the potential for litigating future force majeure disputes. For these reasons, it is in the public interest.

[7] See Resolution E-4606 (2013 Cal. PUC LEXIS 419).

3.4. Conclusion

The settlement is reasonable in light of the whole record, consistent with law, and in the public interest. Accordingly, we approve the settlement and authorize SDG&E to recover the costs incurred pursuant to the terms of the settlement through the Energy Resources Recovery Account.

4. Assignment of Proceeding

Commissioner Michael Peevey is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge (ALJ) and presiding officer in this proceeding.

5. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on October 31, 2013, by UCAN, and reply comments were filed on November 50, 2013, by SDG&E. The Commission hereby adopts the ALJ's proposed decision.

Findings of Fact

1. Comparing the net ratepayer cost of the settlement (payment of the full amount in dispute less the amount of the avoided loss associated with the reduction of deliveries under the Geysers PPA) to the amount of force majeure dispute, ratepayers will pay about 70 cents on the dollar, not 50 cents.
2. The force majeure language in the OMEC PPA creates significant litigation risk.
3. Reducing deliveries from the Geysers facility is consistent with SDG&E's RPS Plan.

4. The settlement agreement avoids the time, expense and uncertainty of further litigating and resolving this matter and potential future force majeure disputes.

Conclusions of Law

1. In light of the whole record, the settlement is reasonable.
2. The settlement does not contravene any statute or Commission decision or rule.
3. The settlement is in the public interest.
4. The settlement should be approved.
5. SDG&E should be authorized to recover the costs incurred under the settlement through the Energy Resources Recovery Account.
6. The ALJ's rulings granting the motions of UCAN and SDG&E to file the confidential versions of their respective briefs under seal should be affirmed.
7. All other pending motions should be deemed denied.
8. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The settlement is approved.
2. San Diego Gas & Electric Company is authorized to recover the costs incurred under the settlement agreement in its Energy Resource Recovery Account.
3. The Administrative Law Judge's rulings granting the motions of Utility Consumers Action Network and San Diego Gas & Electric Company to file the confidential versions of their respective briefs under seal is affirmed.

4. All other pending motions are deemed denied.
5. Application 13-05-012 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

SERVICE LIST

************** SERVICE LIST A1305012*************
Last Updated on 08-OCT-2013 by: JVG

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(End of Service List)

(End of Appendix A)